IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18/03/2003

CORAM

THE HON'BLE MR.JUSTICE E.PADMANABHAN

WRIT PETITION NO. 17415 of 1997 and WRIT PETITION NO. 17416 of 1997

J.Bernard Jacob Ross ..Petitioner
in both WPs

-Vs-

1. The Chairman
TNEB, 800, Anna Salai
Chennai-2

2. The Chief Engineer/Hydro & Gas
Turbine, 2nd Floor Eastern Wing
NPKRR Maaligai
800, Anna Salai
Chennai-2 ..Respondents
in both WPs

For petitioner:: Mr.S.J.Jagadev

For respondents: Mr.V.Radhakrishnan

Petitions filed under Article 226 of The Constitution of India praying for the issue of a writ of certiorari/mandamus as stated therein.

:O R D E R

In W.P.No:17415 of 1997, the petitioner has prayed for the issue of a writ of certiorari calling for the records relating to the order passed by the 1st respondent in B.P.(ch)No.379 dated 24.1.1996 confirming the order passed by the second respondent in Memo No.649(1)/ CE/E&GT/PA/A2/91-96, dated 8.2.1996 and quash the same.

2. In W.P.No.17416 of 1997, the very same petitioner has prayed for the issue of a writ of mandamus directing the respondents to promote the petitioner to the cadre of Executive Engineer, (Electricity) retaining his original seniority between Mr.K.C.Loganathan and T. Sathya Murthy.

3. The writ petitions are pending at the stage of notice of motion and the same were taken up with the consent of either side. Heard Mr.

S.J.Jagadev, learned counsel appearing for the writ petitioner and Mr.V.Radhakrishnan, learned counsel appearing for the respondents.

4. While the writ petitioner was working as Assistant Executive Engineer, applied on 5.10.1991 for extraordinary leave without pay and allowances for a period of three years from 16.7.1991 to 15.11.1994 to take up employment in a foreign country. The application was forwarded to the Chief Engineer.

5. In respect of the misconduct charges were framed and proceeded. As against the petitioner a punishment was imposed by the Chief Engineer on 21.11.1991 imposing punishment of stoppage of increment for a period of one year without cumulative effect for unauthorised absence between 6.12.1988 and 4.4.1989.

6. Once again the petitioner left India on 21.12.1991 without obtaining No Objection Certificate and approval and sanction of leave. On 17.4.1995, the petitioner was called upon to submit his explanation which he submitted on 10.5.1995. As the explanation was not satisfactory the Chief Engineer famed three charges against the petitioner and called upon him to submit his explanation. As the Explanation was not satisfactory an Enquiry Officer was appointed who submitted his report finding the petitioner guilty of the three charges framed against him.

7. The Disciplinary proceedings were initiated for a major penalty as seen from the charge memo as well as the appointment of the enquiry Officer who submitted his report. However, without communicating the enquiry officer's report the disciplinary authority while accepting the report of the enquiry officer imposed the punishment of stoppage of increment for a period of three years but without cumulative effect. Thereafter the petitioner preferred an appeal which was rejected by the appellate authority namely the Chairman, Electricity Board. The petitioner's memorial also came to be rejected. Hence the writ petition.

8. Though Mr.Jagadev, learned counsel appearing for the petitioner persuaded this court to examine the merits of the charges and also attempted to argue that the proceedings before the enquiry officer is irregular, illegal, baseless and groundless, this court is not persuaded to examine the same as the same are not liable to be interfered in exercise of powers of judicial review.

9. Though the counsel for the petitioner has not raised a substantial question of law which arises on the admitted facts, however, arguments were advanced. The contention being failure to communicate the findings of the enquiry officer and calling upon the petitioner to state his objections with respect to findings reported against him. The petitioner contended that there is violation of principles of natural justice as the disciplinary authority has relied upon the enquiry officer's report and found the petitioner guilty of all the three charges and imposed punishment of stoppage of increment. Mr. Jagadev, learned counsel contended that there is violation of the dictum laid

down by the Supreme Court in Ramzan Kahn's case as well as B.Karunakar's case. There is force in this contention.

10. Per contra, Mr.V.Radhakrishnan, learned counsel appearing for the respondents contended that the petitioner has not raised such a contention either before the appellate authority or in this writ petition and therefore he shall not be permitted to advance a new contention at this stage. Mr.V.Radhakrishnan, also contended that no prejudice has been pleaded and therefore the petitioner cannot advance such a contention for the first time at this stage. This court is unable to persuade itself to sustain the objection raised by Mr.V. Radhakrishnan , learned counsel appearing for the respondents in this respect.

11. A perusal of the impugned order as well as the appellate authority would show that much reliance has been placed upon enquiry officer's report tohold the petitioner guilty of charges. If the enquiry officer's report is eschewed there is no other material to implicate the petitioner. The petitioner has been deprived of the enquiry officer's report and he should have been called upon to submit his objection to the enquiry officer's report and thereafter the disciplinary authority should have imposed further to the penalty. The learned counsel for the petitioner as well as the respondents took the court through the copy of the proceedings as well as the rules.

12. Mr.Jagadev, learned counsel contended that when the petitioner has applied for leave and has been pressing the respondent to grant leave, they should have either granted the leave or should he rejected the same. Instead they kept pending and it is pending even till date. It is also contended by Mr.Jagadev that the respondents have failed to discharge their obligation as leave Sanctioning Authority. either by rejecting the leave application or by sanctioning the leave applied for and it is not open to them to initiate proceedings.

13. The learned counsel also relied upon the Boar's proceedings which enables the petitioner to go abroad as per the policy decision taken by the Electricity Board. This court is not inclined to go into those matters as concedingly without prior permission and approval of the competent authority and without sanction of the leave, the petitioner for the second time went abroad on foreign assignment of his choice. On the earlier occasion also for the same misconduct the petitioner was imposed with the penalty of stoppage of increment of one year and the petitioner had proceeded for the second time as well without complying with the requirements and without prior permission or sanction.

14. The charges are not vague as sufficient particulars have been set out in the charge memorandum. That apart, the petitioner did not have any grievance and he did not also raise any objection in this respect. The petitioner has not complained that the disciplinary authority has failed to furnish the details or particulars nor he has requested the disciplinary authority to furnish or produce details or evidence. On the very Explanation submitted by the petitioner it cannot be contended that he is not guilty of imputations which is the basis of all the three charges.

15. Admittedly, the charges were framed under Regulation 8(b) of the Tamil Nadu Electricity Board Employees (Discipline and Appeal) Regulations. The petitioner submitted his objections and requested for oral enquiry and personal hearing. The disciplinary authority appointed an enquiry officer, who conducted the enquiry and submitted his findings reporting that the petitioner is guilty of the three charges. Admittedly the enquiry report has not been communicated to the petitioner, nor an opportunity was afforded to the petitioner in this respect. But it was communicated along with the penalty proceedings. No opportunity at all has been afforded to the petitioner to state his objections with respect to the findings re ported by the enquiry officer and it was communicated along with the penalty proceedings.

16. It is pointed out that the disciplinary authority concurred with the enquiry officer's findings and imposed the penalty of stoppage of increment for three years. Such a penalty has not only resulted in stoppage of increment but also prejudiced the petitioner from getting promotion to the higher cadre, while juniors have been promoted. Admittedly though charges were framed the petitioner was required to state his explanation, enquiry was conducted, enquiry report was submitted, but without affording an opportunity to state objections with respect to findings reported by the Enquiry Officer and without affording a personal hearing, which is the substantial part of the sub clause/regulation (b) of Regulation 8, the penalty of stoppage of increment has been imposed in the present case.

17. Regulation 8(b)(iii) prescribes that before making an order imposing such penalty, the disciplinary authority has to furnish the delinquent official, a copy of the report of the enquiry or personal hearing or both as the case may be and call upon the delinquent to submit his further representation if any and thereafter consider the representation as well as evidence adduced during enquiry to impose punishment. In the present case admittedly the enquiry report has not been communicated to the writ petitioner before imposition of penalty, nor the petitioner has been afforded an opportunity to state his objection, nor the petitioner has been heard. Thus Regulation 8(b)(iii) has been violated in the imposition of impugned penalty.

18. The learned counsel for the petitioner contended that there is violation of principles of natural justice. In this case, as well as violation of the very Regulation 8(a) and (b) which provides for communication of the copy of the enquiry report and for affording an opportunity to state objection as to the findings as well as a hearing. Apart from that it is the settled law that enquiry report should be communicated, objection should be called for with respect to findings reported and thereafter impose such penalty as the disciplinary authority may decide to impose.

19. Mr.Jagadev, learned counsel contended that the procedure adopted in this case is violative of principles of natural justice as well as the Rule 8(b) (iii) and on this short ground also the impugned proceedings are liable to be quashed. Per contra, Mr.V.Radhakrishnan, learned counsel appearing for the respondents contended that the punishment imposed being minor, no opportunity need be given. This contention advanced by Mr.V.Radhakrishnan

cannot be sustained in the light of the proviso to Regulation 8(a) as well as 8(b)(iii). The above provisions which are mandatory have been violated by the respondents and this is fatal to the impugned proceedings.

20. That apart, a Three Judges Bench of the Supreme Court in Punjab National Bank Vs. Kunhi Behari Misra, reported in 1998 (7) SCC 84 after considering the earlier pronouncement in B.Karunakar's case (1993 (4) SCC 727) and other catena of pronouncements held thus:-

"16.....The Court explained that the disciplinary proceedings break into two stages. The first stage ends when the disciplinary authority arrives at its conclusions on the basis of the evidence, the enquiry officer's report and the delinquent employee's reply to it. The second stage begins when the disciplinary authority decides to impose penalty on the basis of its conclusions. It is the second right which was taken away by the 42nd Amendment but the right of the charged officer to receive the report of the enquiry officer was an essential part of the first stage itself. This was expressed by the Court in the following words: (SCC p. 754, para 26)
"26. The reason why the right to receive the report of the enquiry officer is considered an essential part of the reasonable opportunity at the first stage and also a principle of natural justice is that the findings recorded by the enquiry officer form an important material before the disciplinary authority which along with the evidence is taken into consideration by it to come to its conclusions. It is difficult to say in advance, to what extent the said findings including the punishment, if any, recommended in the report would influence the disciplinary authority while drawing its conclusions. The findings further might have been recorded without considering the relevant evidence on record, or by misconstruing it or unsupported by it. If such a finding is to be one of the documents to be considered by the disciplinary authority, the principles of natural justice require that the employee should have a fair opportunity to meet, explain and controvert it before he is condemned. It is negation of the tenets of justice and a denial of fair opportunity to the employee to consider the findings recorded by a third party like the enquiry officer without giving the employee an opportunity to reply to it. Although it is true that the disciplinary authority is supposed to arrive at its own findings on the basis of the evidence recorded in the enquiry, it is also equally true that the disciplinary authority takes into consideration the findings recorded by the enquiry officer along with the evidence on record. In the circumstances, the findings of the enquiry officer do constitute an important material before the disciplinary authority which is likely to influence its conclusions. If the enquiry officer were only to record the evidence and forward the same to the disciplinary authority, that would not constitute an additional material before the disciplinary authority of which the delinquent employee has no knowledge. However, when the enquiry officer goes further and records his findings, as stated above, which may or may not be based on the evidence on record or are contrary to the same or in ignorance of it, such findings are an additional material unknown to the employee but are taken into consideration by the disciplinary authority while arriving at its conclusions. Both the dictates of the reasonable opportunity as well as the principles of natural justice, therefore, require that before the disciplinary authority comes to its own conclusions, the delinquent

employee should have an opportunity to reply to the enquiry officer's findings. The disciplinary authority is then required to consider the evidence, the report of the enquiry officer and the representation of the employee against it."

17.These observations are clearly in tune with the observations in Bimal Kumar Pandit case quoted earlier and would be applicable at the first stage itself. The aforesaid passages clearly bring out the necessity of the authority which is to finally record an adverse finding to give a hearing to the delinquent officer. If the enquiry officer had given an adverse finding, as per Karunakar case the first stage required an opportunity to be given to the employee to represent to the disciplinary authority, even when an earlier opportunity had been granted to them by the enquiry officer. It will not stand to reason that when the finding in favour of the delinquent officers is proposed to be overturned by the disciplinary authority then no opportunity should be granted. The first stage of the enquiry is not completed till the disciplinary authority has recorded its findings. The principles of natural justice would demand that the authority which proposes to decide against the delinquent officer must give him a hearing. When the enquiring officer holds the charges to be proved, then that report has to be given to the delinquent officer who can make a representation before the disciplinary authority takes further action which may be prejudicial to the delinquent officer. When, like in the present case, the enquiry report is in favour of the delinquent officer but the disciplinary authority proposes to differ with such conclusions, then that authority which is deciding against the delinquent officer must give him an opportunity of being heard for otherwise he would be condemned unheard. In departmental proceedings, what is of ultimate importance is the finding of the disciplinary authority.

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19.....The report of the enquiry officer containing its findings will have to be conveyed and the delinquent officer will have an opportunity to persuade the disciplinary authority to accept the favourable conclusion of the enquiry officer. The principles of natural justice, as we have already observed, require the authority which has to take a final decision and can impose a penalty, to give an opportunity to the officer charged of misconduct to file a re presentation before the disciplinary authority records its findings on the charges framed against the officer."
This pronouncement squarely applies to the facts of this case and there is no escape for the respondents.

21. In Yoginath D.Bagde Vs. State of Maharashtra, reported in 1999 (7) SCC 739, after referring to the Punjab National Bank Vs. Kunj Behari Misra case, the Apex Court held thus:-
"30. Recently, a three-Judge Bench of this Court in Punjab National Bank v. Kunj Behari Misra11 relying upon the earlier decisions of this Court in State of Assam v. Bimal Kumar Pandit, Institute of Chartered Accountants of India v. L.K. Ratna as also the Constitution Bench decision in Managing Director, ECIL v. B. Karunakar and the decision in Ram Kishan v. Union of India has held that: (SCC p. 96, para 17)

"It will not stand to reason that when the finding in favour of the delinquent officers is proposed to be overturned by the disciplinary authority then no opportunity should be granted. The first stage of the enquiry is not completed till the disciplinary authority has recorded its findings. The principles of natural justice would demand that the authority which proposes to decide against the delinquent officer must give him a hearing. When the enquiring officer holds the charges to be proved, then that report has to be given to the delinquent officer who can make a representation before the disciplinary authority takes further action which may be prejudicial to the delinquent officer. When, like in the present case, the enquiry report is in favour of the delinquent officer but the disciplinary authority proposes to differ with such conclusions, then that authority which is deciding against the delinquent officer must give him an opportunity of being heard for otherwise he would be condemned unheard. In departmental proceedings, what is of ultimate importance is the finding of the disciplinary authority."
The Court further observed as under: (SCC p. 96, para 18)
"When the enquiry is conducted by the enquiry officer, his report is not final or conclusive and the disciplinary proceedings do not stand concluded. The disciplinary proceedings stand concluded with the decision of the disciplinary authority. It is the disciplinary authority which can impose the penalty and not the enquiry officer. Where the disciplinary authority itself holds an enquiry, an opportunity of hearing has to be granted by him. When the disciplinary authority differs with the view of the enquiry officer and proposes to come to a different conclusion, there is no reason as to why an opportunity of hearing should not be granted. It will be most unfair and iniquitous that where the charged officers succeed before the enquiry officer, they are deprived of representing to the disciplinary authority before that authority differs with the enquiry officer's report and, while recording a finding of guilt, imposes punishment on the officer. In our opinion, in any such situation, the charged officer must have an opportunity to represent before the disciplinary authority before final findings on the charges are recorded and punishment imposed."

22. In the light of the above discussions and in the light of the above pronouncements of the Apex Court, this court holds that the impugned proceedings of both the respondents are liable to be quashed. This court has to necessarily interfere as illegality has crept in at the stage of imposing penalty in that the enquiry officer's report has not been communicated to the petitioner and as a result of which the petitioner has been deprived of valuable right of putting forth his objections to the enquiry officers report, which is substantive in nature.

23. Though Mr.V.Radhakrishnan relied upon the pronouncement of the Apex Court in 1996 (3) SCC 364 and contended that the failure to communicate the enquiry officer's report and call upon the petitioner to state his objections has not prejudiced the petitioner, but on the facts of the case, this court is of the considered view that the findings of the enquiry officer has been heavily relied upon and therefore non communication of the enquiry officer's report has vitiated the proceedings of the second respondent as affirmed by the first respondent. Contention advanced in this respect by Mr.V. Radhakrishnan, learned counsel appearing for the respondents cannot be

sustained.

24. In the result, the impugned proceedings of the disciplinary authority as well as the appellate authority are quashed and the matter is remitted back to the second respondent, who shall proceed from the stage at which the illegality has crept in namely call upon the petitioner to state his objections, if any to the findings recorded in enquiry report and thereafter proceed further. In this case, the enquiry officer's report has been communicated to the petitioner along with the impugned proceedings. Therefore it need not be communicated once again. The second respondent shall call upon the petitioner to state his objections if any with respect to the enquriy officer's report and thereafter pass fresh orders according to the Tamil Nadu Electricity Board Employees' (Discipline and Appeal) Regulations.

25. Writ Petition No.17415 of 1997 is allowed to the extent indicated above with the above direction. No costs.

W.P.NO:17416 of 1997

26. In this writ petition, the petitioner has prayed for the issue of a writ of mandamus to promote him. The petitioner was considered for promotion. But he was overlooked as he was undergoing the penalty of stoppage of increment during the material point of time. Therefore the denial of promotion cannot be held to be illegal or arbitrary. Though Mr.Jagadev relied upon the Division Bench judgement in W.A.No.1358 of 1988 (The Superintending Engineer, Udumalpet Electricity System TNEB Vs. Arumugam) dated 10.8.1992 and sought to contend that as minor penalty alone has been imposed there could be no denial of promotion. This court is unable to sustain such a contention and Division bench Judgement also in no way supports the petitioner' s contention. The Division Bench on the facts of the said case held that on the crucial date there was no punishment to deny promotion.

27. On the facts of this case, this court holds that the petitioner is not entitled for a mandamus as prayed for. However, if the second respondent proceeds further and pass orders with respect to the three charges which is the subject matter of challenge in W.P.No:1741 5of 197 and depending upon the ultimate orders the petitioner's request for promotion could be

reconsidered by the respondent. To this limited extent, there will be a direction to reconsider the petitioner's request for promotion as soon as the disciplinary proceedings conclude.

28. In the result,
(i) Writ Petition No. 17415 of 1997 is allowed and remitted to the disciplinary authority to proceed from the stage at which illegality has crept in;
(ii) Writ petition No.17416 of 1997 is dismissed with directions as stated above.
(iii) There is no order as to costs in both the Writ petitions.

Internet:yes
Index:yes
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18-03-2003

To

1. The Chairman
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Chennai-2

2. The Chief Engineer/Hydro & Gas
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